IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-4531

STATE OF NEW HAMPSHIRE,
*Petitioner*

*v.*

UNITED STATES OF AMERICA,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

David H. Souter
Attorney General
State of New Hampshire

Edward A. Haffer
Assistant Attorney General
State of New Hampshire

State House Annex
Concord, New Hampshire 03301
Counsel for Petitioner

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## OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is not yet generally reported, but appears in Appendix I hereto. No opinion was rendered by the United States District Court for the District of New Hampshire.

## JURISDICTION

The judgment of the court of appeals was entered on 5 August 1976; no rehearing was sought. This petition has been brought within ninety days of that judgment. The Supreme Court has jurisdiction under 28 U.S.C. §1254 (1).

## QUESTIONS PRESENTED

1. In purporting to require employers to make "race/ethnic group identifications" of employees, is 29 C.F.R. Part 1602 authorized by section 709 (c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e-8 (c) )?

2. Insofar as section 709 (c) purports to authorize such a regulation, is section 709 (c) a constitutional extension of Congress's power to enforce equal protection of the laws, under the Fourteenth Amendment sections 1 and 5, or to regulate interstate commerce, under Article I section 8 clauses 3 and 18?

3. Insofar as section 709 (c) purports to authorize such a regulation, does section 709 (c) cause violation of: the right of privacy guaranteed by the penumbras of the Bill of Rights; liberty guaranteed by the Fifth and Fourteenth Amendments; powers reserved to the states under the doctrine of intergovernmental immunity and the Tenth Amendment; prohibitions implicit in the Thirteenth Amendment against racial badging; and prohibitions implicit in Article I sections 1 and 8 against delegation of legislative powers?

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The constitutional provisions involved are the Fourteenth Amendment sections 1 and 5, Article I section 8 clauses 3 and 18, as well as the Fifth, Tenth, and Thirteenth Amendments, and Article I section 1. These provisions are set out in Appendix II hereto.

The principal statute involved is section 709 (c) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §2000e-8 (c) ). This section and parts of a relevant, related section — section 703 (a) and (j) (42 U.S.C. §2000e-2 (a) and (j) ) — are set out in Appendix III hereto.

The regulation involved is 29 C.F.R. Part 1602 — more particularly, its sections 1602.30 and 1602.32, together with related instructions promulgated in 38 F.R. 5659-66 and 12604-05 and 41 F.R. 17601-02. The two sections and the most significant part of the instructions are set out in Appendix IV hereto.

## STATEMENT OF THE CASE[1]

The State of New Hampshire is an "employer" within the meaning of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C. §§2000e et seq.). Section 701 (a) and (b) (42 U.S.C. §2000e (a) and (b)). On this point, there has never been any dispute.

Title VII, which is administered by the Equal Employment Opportunity Commission (EEOC), prohibits such employers from engaging in certain "unlawful employment practices"; i.e., it prohibits them from making certain employment decisions on the basis of race, color, religion, sex, or national origin. Sections 703 (a) and 704 (42 U.S.C. §§2000e-2 (a) and 2000e-3). Section 709 (c) (42 U.S.C. §2000e-8 (c)), the central statute in this case, requires employers to make records that are "relevant" to issues of unlawful employment practices and to make such reports from those records as the EEOC prescribes as "reasonable, necessary, or appropriate" for enforcement of Title VII. Under sections 705 (g) (2), 706, 707, 709 (a), and 710 (42 U.S.C. §§2000e-4 (g) (2), 2000e-5, 2000e-6, 2000e-8 (a), and 2000e-9), the EEOC has power to investigate alleged violations of Title VII and to enforce Title VII.

The regulations that purport to implement section 709 (c) are contained in 29 C.F.R. Part 1602. These regulations require employers to make and record "race/ethnic group identifications" of their employees, and to report the identifications annually to the EEOC. For nonfederal-government employers, 29

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[1]References are made to the appendix (A.) before the court of appeals. Nine copies of this appendix have been filed with the Clerk of the Supreme Court.

C.F.R. §§1602.30 et seq. are the controlling regulatory provisions, and they require these employers to submit their identification reports on EEOC forms, called "State and Local Government Information Reports EEO-4." (A. 3.) To make the identifications themselves, an employer either visually surveys each employee or takes racial information from each employee's post-employment records. (A. 41, 56.) An employee himself, however, is not required to give such information to the employer. The reports to the EEOC purport to show, for every job category, the number of employees of certain racial categories. (A. 24-31.) The reports are in gross; i.e., they do not identify any individual employee by name or racial category. Such identifications and reports are required of *all* employers within the meaning of the statute and regulation — even those for whom there is no allegation or reason to believe that they are committing any unlawful employment practice.

New Hampshire did not seek an exemption, under 29 C.F.R. §1602.35, from filing such reports. But believing "race/ethnic group identifications" to be unlawful and unconstitutional, it refused to make, record, and report such identifications for calendar years 1973, 1974, and 1975.[2] (A. 3.) For 1973, however, New Hampshire did file a report on the EEOC forms; but rather than use the ethnic designations there provided, it used the word "American" to designate the ethnic category of all its employees. (A. 8, 74.) The EEOC found this report unacceptable and returned it; New Hampshire did not file any further report for that year. (A. 8, 74.) For 1974 and 1975, New Hampshire filed no report at all. All other states — except Hawaii, which has been subject to different requirements — filed acceptable reports for 1973 and 1974 (A. 8, 74.); the record contains no information on 1975 filings.

On 24 September 1973, New Hampshire Governor Thomson wrote as follows to an official of the EEOC:

> If you want a breakdown of our American employees, then I suggest you let us find out by the simple method of asking or letting

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[2]It has, however, complied with the order of the district court, affirmed at the court of appeals, regarding identifications for those years.

them volunteer the information. Otherwise, we would be very happy to have you come and conduct the visual survey . . . . [A. 10.]

And on at least three other occasions similar views were expressed to federal officials by either the Governor or the State's Personnel Director. (A. 15, 19, 21.) The federal officials replied, however, that although voluntary self-identifications were permissible, reports would still have to show identifications for *all* employees, "not only those who [would] voluntarily identify themselves." (A. 23.)

On 8 July 1975, at the United States District Court for the District of New Hampshire, the United States filed the complaint, together with a request for admissions and an interrogatory, (A. 2, 4, 66.) It claimed jurisdiction under section 709 (c) and 28 U.S.C. §1345. The gravamen of the complaint was that, for calendar years 1973 and 1974, New Hampshire had violated 29 C.F.R. Part 1602 and section 709 (c) by not filing reports on the "race/ethnic group identifications" of its employees. The United States prayed for an order that New Hampshire file such reports and for such other relief as might be just.

New Hampshire answered that: insofar as 29 C.F.R. Part 1602 purported to require the State to make, record, and report "race/ethnic group identifications" of its employees, the regulation was not authorized by section 709 (c); and (2) insofar as section 709 (c) purported to authorize the EEOC to require the State to make, record, and report such identifications, section 709 (c) was unconstitutional. (A. 69-71.) The reasons asserted for both parts of New Hampshire's answer are summarized here at pp. 6-18. Subject to its defenses of law and to certain qualifications of fact not material to this petition, New Hampshire admitted the facts alleged in the complaint and the request for admissions, and admitted also the genuineness of the documents filed with the United States' request. (A. 69, 71.)

On 22 December 1975, the district court entered summary judgement for the United States. (A. 77, 78.) The Court ordered New Hampshire to file within a month the "race/ethnic group identifications" of its employees for calendar years 1973, 1974, and 1975. It further ordered New Hampshire to file like reports for subsequent years, in accordance with 29 C.F.R. Part 1602.

New Hampshire appealed to the United States Court of Appeals for the First Circuit. On 5 August 1976, that court entered judgment affirming the decision below.

## REASONS FOR GRANTING THE WRIT

### I. THE FIRST CIRCUIT HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The requirement for "race/ethnic group identifications" binds each and every employer — as well as each and every labor organization — that is subject to Title VII and 29 C.F.R. Part 1602.[3] That kind of nondiscrimination, however, is not a virtue but a vice. It proceeds from the cynical assumption that the fairest employer cannot be trusted any more than the most biased. And it ends in treating every employer as if he were a suspected bigot and lawbreaker.

New Hampshire is one of a handful of states whose policies historically have been free of racial discrimination. See *Keyes* v. *School District No. 1*, 413 U.S. 189, 228 n. 12 (1973) (Powell, J., concurring in part and dissenting in part). The record in the present case, moreover, does not even hint that such discrimination has ever been practiced by New Hampshire. Racial discrimination, therefore, is not the cause of this controversy, although, unhappily, it is the context. The cause is federal bureaucratic abuse.

New Hampshire asks the Court to consider this possibility: that a federal agency, in its preoccupation with one worthy end, may include in its general program specific requirements that

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[3]The regulation here contested has virtually identical counterparts for private employers and for labor organizations. The requirement applies to employers — private, state government, and local government — having at least 100 employees (29 C.F.R. §§1602.7 and 1602.32) and to labor organizations having at least 100 members (29 C.F.R. §1602.22).

are: (1) superfluous to the end in mind, and (2) abusive, albeit not purposely, of other worthy ends not in mind. New Hampshire submits that that possibility has materialized in this case: the regulation in question adds nothing essential to the program against unlawful employment practices; it only creates a gratuitous layer of accountability to the federal government, without statutory warrant and contrary to constitutional principles limiting federal power.

## II. THE FIRST CIRCUIT HAS DECIDED FEDERAL QUESTIONS IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

### A. *In Purporting to Require "Race/Ethnic Group Identifications," the Regulation is Outside the Authority of the Statute.*

For a regulation to be valid, it must be reasonable and must carry out the Congressional will expressed in the pertinent statute; otherwise it is a nullity. See, e.g. *Dixon* v. *United States*, 381 U.S. 68 (1965); and *Reid* v. *Memphis Publishing Co.*, 521 F.2d 512 (6th Cir. 1975) (holding 29 C.F.R. Part 1605 (EEOC Guidelines on Discrimination Because of Religion) to be inconsistent with Title VII), petition for cert. filed, No. 75-1105, 44 L.W. 3480 (U.S.S.C. 1976). By that test, the regulation in question is void.

Section 709 (c), which supposedly authorizes the regulation, requires every employer to "make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed," and to "make such reports therefrom as the Commission shall prescribe by regulation . . . as reasonable, necessary, or appropriate for the enforcement" of Title VII. The relevant definition of "unlawful employment practice" appears in Section 703 (a). See p. 28 hereof.

By requiring each and every employer to classify his employees by racial and ethnic background, the regulation is, in relation to Title VII, not only incongruous but contradictory. It would have each and every employer — even the ones who are utterly without bias — become color-conscious rather than color-blind.

The regulation is, in short, a means turned against Title VII's end. For the natural consequence of thinking, or being forced to think, in terms of color is to act in terms of color. And once such action begins — however subtle its form or benign its objective — it becomes a practice which, in tending to benefit one individual because of his color, tends to deprive another because of his color. Such a "racially differential impact" — even apart from any discriminatory purpose — runs afoul of section 703 (a). *Washington* v. *Davis,* 44 L.W. 4789, 4792 (U.S.S.C. 1976). Moreover, the classification leading to that result is itself contrary to section 703 (a)(2). Title VII sweeps wide: it "tolerates *no* racial discrimination, subtle or otherwise." *McDonnell Douglas Co.* v. *Green,* 411 U.S. 792, 801 (1973) (emphasis added); see also *McDonald* v. *Santa Fe Transportation Co.,* 44 L.W. 5067 (U.S.S.C. 1976).

The regulation is also inconsistent with section 703 (j). See p. 28 hereof. That section is an expression of Congressional disfavor with quotas. The legislative history of the 1964 Civil Rights Act, in which section 703 (j) was enacted, leaves no doubt that Congress rejected numerical formulas as responses to unlawful employment practices. See, e.g. House Judiciary Committee's Report No. 914 Part 2, 88th Cong. 1st Sess. (1963) (additional views on H. R. 7152 (Title VII) of Reps. McCulloch et al.); 110 Cong. Rec. 7207 (1964) (remarks of bill co-manager, Sen. Clark); 110 Cong. Rec. 7212 (1964) (interpretive memorandum of Sens. Clark and Case); 110 Cong. Rec. 8921 (1964) (remarks of Sen. Williams); and 110 Cong. Rec. 12723 (1964) (remarks of Sen. Humphrey). See also *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 430-31 (1971).

Quotas are an impermissible end. And, accordingly, so too should be the means to that end. Yet the regulation in question unmistakably institutionalizes such a means; indeed if quotas were permissible, the regulation would probably be called a perfect enforcement tool.

Quite apart from its inconsistency with section 703 (a) and (j), the regulation is inherently unreasonable. This failing follows from the conceptual crudeness of the regulation's instructions — to which the Court's attention is respectfully directed. See pp. 31-34 hereof. Following are some of the kinds of

questions that these instructions prompt. What is meant by "identifying with" an ethnic group, or by being "regarded in the community as belonging" with an ethnic group? Must a person "identify with" an ethnic group? Must a community regard each of its members as "belonging" with an ethnic group? How valid are "visual surveys" in identifying the ethnic group that a person "identifies with, or is regarded in the community as belonging"? Relevant to the last question is the fact that this Court let stand the reasoning of a three-judge district court in *Tijerina* v. *Henry*, 48 F.R.D. 274 (D.N.M. 1969), appeal dismissed 398 U.S. 922 (1970):

> The Court does not see any way that it could make a determination of what constitutes Mexican, Spanish, and Indian ancestry. . . [T]he complaint is silent as to whether people with some Spanish or Mexican and Indian ancestors as well as ancestors who are of some other extraction, i.e., French, English, Danish, etc., would be included as members of the class. These considerations make this characteristic so vague as to be meaningless. [48 F.R.D. at 276-77.]

New Hampshire is acutely aware of the legion of cases that have sanctioned the use of racial statistics. New Hampshire understands also that racial statistics could be used in dealing with pattern-and-practice problems under section 707. But the regulation in question is not needed for the acquisition of such statistics. In any problem with a particular employer, the EEOC could easily get such statistics — merely by invoking its investigatory powers under the statute. See sections 707(e), 706, 709(a), 710, and 705(g)(2).

The question here is not whether statistics can be required of a *particular employer* in a *particular enforcement action;* the question is whether statistics can be required of virtually *every employer* by *general regulation* of the EEOC. New Hampshire's position is this: given a particular enforcement problem and given Title VII's investigation provisions, the EEOC *could* justify getting racial statistics by means of *particularized* inquiries of *particular* employers; but given no particular enforcement problem and given Title VII's anti-classification and anti-quota provisions, the EEOC *cannot* justify getting racial statistics by means of *generalized* demands on virtually *every* employer, as by means of the regulation in question. What can

be "reasonable, necessary, or appropriate" in the particular can be — and, in this matter, is — unreasonable, unnecessary, and inappropriate in the universal. Cf. *Ristaino* v. *Ross*, 44 L.W. 4305 (U.S.S.C. 1976) (NB n.8 at 4307-08 and accompanying text).

That which would be (1) "relevant" to the determination of an unlawful employment practice, and (2) "reasonable, necessary, or appropriate" for the enforcement of Title VII, and therefore (3) a proper subject of records and reports under section 709 (c) is this: records setting out for each applicant or employee the reasons why he or she was the object of a favorable or unfavorable employment determination by the employer, and reports summarizing those records. Congress gave a useful signal of what it expected when, in the same statutory subsection, it set out a more specific description of the records to be kept for apprenticeship and training programs. See p. 29 hereof.

B. *Insofar As Section 709(c) Purports To Authorize The Regulation, It Is Without Constitutional Basis.*

Citing *Fitzpatrick* v. *Bitzer*, 44 L.W. 5120 (U.S.S.C. 1976), the First Circuit held that section 5 of the Fourteenth Amendment is the constitutional basis for the requirement that state employers make "race/ethnic group identifications." It reasoned that the requirement is an appropriate means to the end of equal protection of the laws, guaranteed by section 1 of the Fourteenth Amendment. In fact, however, the requirement is quite to the contrary. See *Katzenbach* v. *Morgan*, 384 U.S. 641, 650 (1966).

This, again, is not merely a matter where a particular allegation or determination is made that a particular employer has committed acts of discrimination; and where, because of such allegation or determination, that employer is told he must make certain kinds of "race/ethnic group identifications" for a certain period. In such a case, the identifications might be used in investigating the alleged injury or, if injury is found, in providing the needed relief. The present case is different. It concerns, not exceptions to the rule, but the rule itself. We are told in effect that, as a matter of universal policy of indefinite duration, all employers are to become, and remain, color-conscious, in

order to become, and remain, color-blind. This is government by non sequitur. Such illogic at the top evidences two things: (1) parens patriae does not always know best; and (2) doublethink has come at least eight years earlier than George Orwell expected.

"Our Constitution is color-blind . . . ." *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Except when tests of the strictest scrutiny are met, "it does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of [civil] rights." *Id.* at 554 (Harlan, J., dissenting).

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, *Slaughter House Cases*, 16 Wall 36 (1873); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880); *Ex parte Virginia*, 100 U.S. 339, 344-45 (1880); *McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964); *Loving* v. *Virginia*, 388 U.S. 1 (1967), racial classifications are "constitutionally suspect," *Bolling* v. *Sharpe*, 347 U.S. 497, 499 (1954), and subject to the "most rigid scrutiny," *Korematsu* v. *United States*, 323 U.S. 214, 216 (1944). They "bear a far heavier burden of justification" than other classifications, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964). [*Hunter* v. *Erickson*, 393 U.S. 385, 391-92 (1969).]

Section 709(c) makes a mockery of these principles: its requirement that every state employer regularly make "race/ethnic group identifications" causes "state action" that contravenes the equal protection clause. See, e.g., *Evans* v. *Newton*, 382 U.S. 296 (1965), and *Shelley* v. *Kramer*, 334 U.S. 1 (1948). Congress has absolutely no power to authorize such action. *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The recurring requirement on all employers for "race/ethnic group identifications" should be no more tolerated than the quotas to which they are conducive. Cf. *Board of Education* v. *Spangler*, 44 L.W. 5144 (U.S.S.C. 1976); *Swann* v. *Board of Education*, 401 U.S. 1, 24, 31-32 (1971). In *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), this Court upheld a state court's injunction against blacks who were picketing to have an employer hire by racial quotas. Speaking for a unanimous Court (Douglas, J., not participating), Mr. Justice Frankfurter said at 463-64:

[The] background of California's legal policy is relevant to the conviction of its court that it would encourage discriminatory hiring, to give constitutional protection to petitioners' efforts to subject the opportunity of getting a job to a quota system. The view of that court is best expressed in its own words:

> "It was just such a situation — an arbitrary discrimination upon the basis of race and color alone, rather than a choice based solely upon individual qualification for the work to be done — which we condemned in the Marinship case. . . . The fact that those seeking such discrimination do not demand that it be practiced as to all employees of a particular employer diminishes in no respect the unlawfulness of their purpose; they would, to the extent of the fixed proportion, make the right to work for . . . [the employer] dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race. If petitioners were upheld in their demand then other races, white, yellow, brown and red, would have equal rights to demand discriminatory hiring on a racial basis. Yet that is precisely the type of discrimination to which petitioners avowedly object." 32 Cal2d at 856, 198 P2d at 889.

These considerations are most pertinent in regard to a population made up of so many diverse groups as ours. To deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portuguese in New Bedford, of Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities. States may well believe that such constitutional sheltering would inevitably encourage use of picketing to compel employment on the basis of racial discrimination. In disallowing such picketing States may act under the belief that otherwise community tensions and conflicts would be exacerbated. The differences in cultural traditions instead of adding flavor and variety to our common citizenry might well be hardened into hostilities by leave of the law.

Compare *DeFunis* v. *Odegaard,* 416 U.S. 312, 331-48 (1974) (Douglas, J., dissenting); cf. *Carter* v. *Greene County,* 396 U.S. 320 (1970); *Mayor* v. *Educational Equality League,* 415 U.S. 605 (1974).

In *Anderson* v. *Martin,* 375 U.S. 399 (1964), this Court struck down a Louisana statute which required that, in all state elec-

tions, the nomination papers and ballots designate the race of the candidates. Writing for a unanimous Court, Mr. Justice Clark said:

> . . . [B]y directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color, is an important — perhaps paramount — consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot along racial lines. . . . The vice lies not in the resulting injury but in the placing of the power of the State behind a racial classification that induces racial prejudice at the polls. . . . We see no relevance in the State's pointing up the race of the candidate as bearing upon his qualifications for office. Indeed, this factor in itself "underscores the purely racial character and purpose" of the statute. [Id. at 402-03.]

As has already been said, section 709 (c) induces employers to think in terms of color, rather than merit; and the natural consequence of thinking in those terms is to act in those terms.

From the same premise — that race does not matter — the Fourteenth Amendment and section 709 (c) proceed to opposite conclusions: the Fourteenth Amendment's is that state action *should not* have a "purely racial character and purpose," whereas section 709 (c) 's is that state action *should* have a "purely racial character and purpose." The Fourteenth Amendment conforms to logic; section 709 (c) does not.

> Racial discrimination in any form and in any degree has no justifiable part whatsoever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. [*Korematsu* v. *United States*, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting).]

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Just as the requirement for "race/ethnic group identifications" has no constitutional warrant under the Fourteenth Amendment, so too it has no constitutional warrant under the interstate commerce clause or "elastic" clause of Article I section 8. See *Fitzpatrick* v. *Bitzer*, *supra* at 5122 n. 9, NB concurring opinions of Brennan, J., and Stevens, J.; see also, *McCulloch* v. *Maryland*, 17 U.S. 316, 421 (1819).

In *United States* v. *Rock-Royal Cooperative*, 307 U.S. 533, 569-70 (1938), this Court said: "The authority of the Federal government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce." Upon that statement, New Hampshire poses the following hypothetical. In the early 1960's, a state with a notorious history for segregation could have enacted a statute calling for employers in intrastate commerce to report on the "race/ethnic group identifications" of their employees. The true motive for the legislation might have been to keep tabs on, and possibly impede, the development of black or integrated businesses. But the state could have professed publicly that the statute was intended to police and prevent employment practices based on racial and ethnic prejudices. One has difficulty imagining, however, that this Court would have looked favorably upon such a statute or such an argument. One may fairly speculate that the Court would have minced no words in striking the statute down. The Court might have said that the statute was a crude abuse of the state's power to regulate intrastate commerce; and it might have added that the statute was an affront to the ethic of color-blindness that is the essence of the equal protection clause of the Fourteenth Amendment. Cf. *Anderson* v. *Martin*, 375 U.S. 399 (1964). If this speculation is not awry, why should a court now uphold a like statute for interstate commerce, one enacted and amended by the federal government? Given the *Rock-Royal* statement, why should "race/ethnic group identifications" be constitutional under a federal statute regulating interstate commerce, if they would have been unconstitutional under a state statute regulating intrastate commerce? Asked another way, why should color-consciousness be any less offensive as a federal requirement now than it would have been as a state requirement in the early 1960's?

"Commerce . . . is an intensely practical matter." *North American Co.* v. *SEC*, 327 U.S. 686, 705 (1946); cf. *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1943). Its regulation should likewise be "intensely practical"; "[r]egulation is not intended to be a mere wanton exercise of power." *Erie R. Co.* v. *New York*, 233 U.S. 671, 683 (1914). Section 709(c), however, defies practicality; its only justification is unrefined reason and raw power.

C. *Insofar As Section 709(c) Purports To Authorize The Regulation, It Causes Violation Of Certain Constitutional Principles.*

By following the mandate derived from section 709 (c), New Hampshire violates the right of privacy of its employees. Congress has no power to force such impermissible state action. Cf. *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

The "right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). So "comprehensive" a right should include the right to refuse to inform the government of one's racial/ethnic background. Referring to the Fifth, Thirteenth, and Fourteenth Amendments specifically and also to the Bill of Rights generally, one could fairly tell the government — state or federal — that the color of his or her skin is simply none of the government's business. And if the government would lack the power to compel that information directly, from the individual concerned, it should likewise lack the power to compel that information indirectly, from the employer of such individual.

It is no answer to this argument to say that the reports here required are merely in gross, that they do not identify any particular employee by race, and that they therefore invade no one's privacy. Saying this ignores what precedes the reports; it ignores the offending acts — the visual surveys of *individuals* or the making of certain post-employment records on *individuals*. With similar voids in logic, the government could profess to justify in-gross reports on the frequency with which persons have psychiatric treatment or the frequency with which they have sexual relations. Psychiatric and sexual in-gross reports, in and of themselves, might not offend anyone's privacy; but that simply is not the point. What is the point is the personal prying that would have to precede such reports — prying that could palpably offend the privacy of each and every individual who was later to become a statistic within these reports. Whether directly, or indirectly through agents, government cannot lightly intrude into anything which is a matter of individual privacy; and this

applies no less to racial and ethnic background than to psychiatric needs and sexual habits.

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Liberty, under both the Fifth and Fourteenth Amendments, is given a broad construction. *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972). It denotes not only freedom from bodily restraint but also the right "to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." *Id.* at 572. One of these privileges, we submit, stems from the constitutional doctrine of limitation of powers: it is a freedom from governmental obtrusions that are excessive in demand and attenuated in justification. More specifically, for an employer[4], it is a freedom from such offensive federal commands as that to "eyeball," record, and report the skin color of human beings; and, for an employee, it is a freedom from having his or her own skin color "eyeballed," recorded, and reported for the state and federal governments.

It is these freedoms which section 709(c) infringes without due process. In its indiscriminate sweep, in its failure to provide for traditional procedural safeguards, it entrenches on the liberty of persons who are not even the subject of a particular enforcement action.

The implementation of section 709(c) illustrates what Mr. Justice Brandeis warned against in his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928):

> Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by

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[4]The treatment of states as private persons for purposes of the Fifth Amendment is not new. In *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson, Co.*, 313 U.S. 508 (1941), the Court held that state property was to be treated like private property for purposes of Fifth Amendment takings by the federal government. See also *Alamo Land & Cattle Co.* v. *Arizona*, 44 L.W. 4217 (U.S.S.C. 1976). If a state qua landowner is protected by the Fifth Amendment, then a state qua employer should likewise be protected by the Fifth Amendment. Contrast a state qua sovereign. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

• • •

A *private* employer could argue that, in requiring the submission of "race/ethnic group identifications," section 709(c) is tantamount to an administrative subpoena, and should, therefore, be subject to the same Fourth Amendment limitations that apply to such a subpoena. See *See* v. *Seattle*, 387 U.S. 541 (1967). But section 709(c) rolls over the Fourth Amendment. With no reference to "probable cause," with no allowance for an employer to "obtain judicial review of the reasonableness of the demand [for 'race/ethnic group identification' reports] prior to suffering penalties for refusing to comply" — indeed with no particular enforcement action even contemplated in connection with the demand — section 709(c) violates the "rather minimal limitations on administrative action" discussed in *See*, *Id.* at 544-45.

A state employer could not directly avail itself of such a Fourth Amendment argument. Yet to the extent that the Fourth Amendment does not protect states from capricious and excessive federal actions, such as the one in issue here, states should be able to take refuge elsewhere — namely, in the constitutional doctrine of intergovernmental immunity and in the Tenth Amendment. Cf. *National League of Cities* v. *Usery*, 44 L.W. 4974 (U.S.S.C. 1976). When non-government employers and both government and non-government employees can resist federal irrationality by invoking the Bill of Rights, states too should be able to resist — by invoking their own constitutional protections. To conclude otherwise would be nonsensical: it would be to conclude that with respect to states — but no one else — the federal government can be irrational.

• • •

Under the Thirteenth Amendment, "Congress has the power to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation." *Jones* v. *Alfred H. Mayer, Co.*, 392 U.S. 409, 440 (1968).

Title VII evidences that Congress has determined that unlawful employment practices are "badges and incidents" of slavery. But section 709 (c), ironically, rather intensifies than alleviates the undesired badging. Indeed, the "race/ethnic group identifications" it requires come close to being a literally "badging" process. Because section 709 (c) makes employers focus, not on the qualifications of their employees, but on the "color of their skin, . . . it . . . is a relic of slavery." *Id.* at 442.

* * *

"Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard." *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 282 U.S. 311, 324 (1934); Article I sections 1 and 8. Section 709 (c), however, fails to set out any rational standards for "race/ethnic group identifications." The identifications, then, are not merely a matter of the EEOC's "filling up the details" in Title VII. They are a matter of the EEOC's engrafting thereon its own substantive law – a result beyond Congress's power to authorize.

## CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

David H. Souter
Attorney General

Edward A. Haffer
Assistant Attorney General

## APPENDIX I

## UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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No. 76-1018

UNITED STATES OF AMERICA,
APPELLEE,

*v.*

STATE OF NEW HAMPSHIRE,
DEFENDANT, APPELLANT.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. HUGH H. BOWNES, *U. S. District Judge*]

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Before COFFIN, *Chief Judge*,
MCENTEE and CAMPBELL, *Circuit Judges*.

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*Edward A. Haffer*, Assistant Attorney General, with whom *David H. Souter*, Attorney General, was on brief, for appellant.

*Herbert A. Goldsmith, Jr.*, Attorney, Department of Justice, with whom *J. Stanley Pottinger*, Assistant Attorney General, *William J. Deachman, III*, United States Attorney, and *David L. Rose*, Attorney, Department of Justice, were on brief, for appellee.

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August 5, 1976

MCENTEE, *Circuit Judge*. On July 8, 1975, the United States brought suit against the State of New Hampshire to enforce compliance with the provisions of § 709 (c) of Title VII

of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-8 (c) (1970 ed., Supp. IV), and the regulations of the Equal Employment Opportunity Commission (EEOC) published in 29 C.F.R. Part 1602. Specifically, the United States alleged that New Hampshire had failed to file acceptable "EEO-4" reports[1] for the calendar year 1973[2] and had failed to file any report for the calendar year 1974.

The State admitted each of the factual allegations in the complaint, but asserted as defenses that to the extent that the regulations in issue required the reporting of certain "race/ethnic group identifications," the regulations were not authorized by § 709 (c); and that if § 709 (c) did in fact authorize the imposition of such reporting requirements on the State of New Hampshire, then it was unconstitutional for various reasons. On December 22, 1975, the district court granted the motion of the United States for summary judgment, and this appeal followed. We are not persuaded by the State's arguments concerning either the scope or the constitutionality of § 709 (c), and accordingly we affirm the judgment of the district court.

I

Section 709 (c) of Title VII provides in pertinent part:

"Every employer . . . subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as rea-

[1]The EEO-4 report is a government form on which states and certain local governmental units are required to furnish the race, national origin, and sex of employees in various job categories. Regulations published by the EEOC, pursuant to § 709 (c), mandate the annual filing of EEO-4 reports. 29 C.F.R. Part 1602.

[2]The EEO-4 reports for 1973 were found unacceptable since the State did not indicate on them the race or national origin of its employees, but had simply inserted the word "American" in place of the various ethnic designations on the form.

sonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder."

We must decide whether the EEOC regulations which mandate submission of the EEO-4 report are reasonable and are consistent with this statute from which they purportedly derive their authority. *See Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948).

Unquestionably Congress can delegate certain nonlegislative powers to those charged with administering statutory enactments. "[W]hen Congress [has] legislated and indicated its will, it [can] give to those who [are] to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations . . ." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911), quoting *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.). In our opinion, the challenged regulations represent a reasonable administrative effort "to fill up the details" which Title VII implied but did not specify. The information which the regulations require a state to furnish on the EEO-4 form is essentially raw statistical data which, properly interpreted, can provide an intelligent basis for determining whether the state may be guilty of an unlawful employment practice within the purview of Title VII. *See* 42 U.S.C. § § 2000e-2 and 3.[8] Information like that which the EEO-4 form seeks to accumulate is often highly useful when an agency or court attempts to make the often difficult inference that illegal discrimination is or is not present in a particular factual context. As the Fifth Circuit has observed:

> " 'In the problem of racial discrimination, statistics often tell much, and Courts listen.' . . . Our wide experience with cases involving racial discrimination in education, employment, and other segments of society have [sic] led us to rely heavily in Title VII cases on the empirical data which show an employer's overall pattern of conduct in determining

[8]In addition, this statistical data might properly be used by the Commission pursuant to its Congressional authorization "to make such technical studies as are appropriate to effectuate the purposes and policies of this subchapter and to make the results of such studies available to the public . . ." 42 U.S.C. § 2000e-4 (g) (5).

whether he has discriminated against particular individuals or a class as a whole." *Burns* v. *Thiokol Chemical Corp.* 483 F.2d 300, 305 (5th Cir. 1973) (citations omitted), quoting *Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir.), *aff'd* 371 U.S. 37 (1962).

*See also Castro* v. *Beecher*, 459 F.2d 725, 731 (1st Cir. 1972); *United States* v. *Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). We have no doubt but that the information sought on the EEO-4 form is both reasonable and fully consistent with the overall purpose of Title VII, viz. "to achieve equality of employment opportunities and remove barriers that have operated in the past . . ." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-30 (1971).

The State argues that because the information gleaned from the EEO-4 reports *might* be misused in a relief program improperly relying on quotas[4] or in a program violative of § 703(j)[5] of Title VII, 42 U.S.C. § 2000e-2(j), the EEO-4 reporting requirement cannot be sustained. The short answer is, however, that possible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity

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[4]The permissible scope of the use of quotas as a remedy in discrimination cases remains a delicate question. *Compare Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1026-27 (1st Cir. 1974), *cert. denied* 421 U.S. 910 (1975); *Associated General Contractors, Inc.* v. *Altshuler*, 490 F.2d 9, 18 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974); *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) *with Chance* v. *Board of Examiners*, 44 U.S.L.W. 2343 (2d Cir. Jan. 19, 1976); *Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420, 427 & nn. 19-22 (2d Cir. 1975) *See also De Funis* v. *Odegaard*, 416 U.S. 312, 320 (1974) (dissenting opinion of Douglas, J.); *Hughes* v. *Superior Court*, 329 U.S. 460, 467 (1950).

[5]We have recently stated our understanding of the scope of § 703(j). Explicitly adopting the view of the majority in *Rios* v. *Enterprise Ass'n Steamfitters Local 638 of U.A.*, 501 F.2d 622 (2d Cir. 1974), we held that § 703(j) "deals only with those cases in which racial imbalance has come about completely without regard to the actions of the employer." *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, *supra* at 1028.

which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of its interpretation of the data in question remain subject to law and judicial scrutiny.

II

The constitutional basis of § 709 (c) — at least insofar as state and local governments are concerned — is the fifth section of the fourteenth amendment:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Supreme Court has consistently held this section to mean that "Congress is authorized to *enforce* the prohibitions [of the fourteenth amendment] by appropriate legislation." *Ex Parte Virginia*, 100 U.S. 339, 345 (1880) (emphasis in orinal [*sic*]). *See also Katzenbach* v. *Morgan*, 384 U.S. 641, 648-51 (1966). It is clear that when, by the Equal Employment Opportunity Act of 1972, Congress extended the coverage of Title VII to state and local government employees, that was an exercise of the power granted Congress by the fifth section of the fourteenth amendment. The House Report on the 1972 act explicitly states:

> "The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.
>
> "Legislation to implement this aspect of the Fourteenth Amendment is long overdue, and the committee believes that an appropriate remedy has been fashioned in the bill. Inclusion of state and local employees among those enjoying the protection of Title VII provides an alternate administrative remedy to the existing prohibition against discrimination perpetuated 'under color of state law' as embodied in the

Civil Rights Act of 1871, 42 U.S.C. § 1983. . . ." H.R.Rep. No. 92-238, 92d Cong., 2d Sess. 19.

Senator Javits, one of the managers of the 1972 bill in the Senate, also pointed to the fourteenth amendment as the ultimate source of the legislation's authority:

> "[O]ne of the greatest reforms in this bill is its applicability to those who are engaged in State and local employment. . . . If anybody . . . is entitled to equal employment opportunity, it certainly is those people; and the only way they can get it, because the authority so far as they are concerned is the State, is at the hands of the United States, under the 14th amendment. Section 5 of the 14th amendment, giving the power to Congress to enforce by appropriate legislation the provisions of this article, it seems to me, makes it mandatory, not discretionary, . . . that we act affirmatively on this aspect of this bill." 118 Cong. Rec. 1840 (1972).

*See also Fitzpatrick* v. *Bitzer*, 44 U.S.L.W. 5120, 5122 & n.9 (U.S. June 28, 1976); *United States* v. *City of Milwaukee*, 395 F.Supp. 725, 727-28 (E.D. Wisc. 1975).

Given this plain reliance by Congress on the fourteenth amendment, we need not pause for long to inquire whether § 709 (c) constitutes "appropriate legislation" for the enforcement of the provisions of that amendment. Title VII was enacted "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted). In our view, when Congress extended these assurances to state and local government employees in 1972, it was simply enforcing the guarantee of "the equal protection of the laws" accorded by the first section of the fourteenth amendment. *See Fitzpatrick* v. *Bitzer, supra* at 5123. And, as the challenged record keeping and reporting provision. § 709 (c), is a reasonable and proper means of assuring equality in employment, *see* Part I *supra*, it too would be authorized by the fifth section of the fourteenth amendment.

The State also argues vigorously that § 709 (c) is an invalid exercise of Congressional power under the commerce clause

(Art. I, § 8). This argument is beside the point, however, because Congress principally relied on the fourteenth amendment when in 1972 it included states within the purview of Title VII. "While Congress had to draw its power from the commerce clause in order to regulate 'private' employers, the enabling clause of the Fourteenth Amendment specifically enables Congress to enforce the Fourteenth Amendment by 'appropriate legislation.' Therefore, since state and local government employers are subject to the Fourteenth Amendment, Congress has the power to regulate these entities by appropriate legislation independent from any affect [sic] upon interstate commerce." *United States* v. *City of Milwaukee, supra* at 728. *See also Fitzpatrick* v. *Bitzer, supra at* 5122 & n.9. New Hampshire of course lacks standing to contest whether any given private employer is properly included within the scope of Title VII[6].

In sum, we hold that the State's constitutional objections to § 709 (c) must be rejected as failing to give sufficient weight to the very broad enforcement power which the fifth section of the fourteenth amendment accords to Congress.

III

Finally, the State claims that the district court erred in awarding costs in favor of the United States. It is true, as the State points out, that Title VII does not explicitly provide for the awarding of costs when the United States is the prevailing party, but neither does it prohibit such an award. Under these circumstances and in the light of our extensive discussion in *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1028-29 (1974), *cert. denied*, 421 U.S. 910 (1975), the court did not err in awarding costs to the United States.

Affirmed.

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[6]The State has also raised several less weighty objections to the validity of § 709 (c). We have examined each of these objections, but find none of them persuasive or deserving of discussion.

## APPENDIX II

### Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

Section. 8. The Congress shall have Power . . .

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

* * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * *

### Amendment [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

AMENDMENT [X.]

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

* * *

AMENDMENT XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

* * *

AMENDMENT XIV.

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

## APPENDIX III

Sec. 703. (a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

* * *

Sec. 709. (c) Every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful em-

ployment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports [illegible] order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

## APPENDIX IV

### § 1602.30 Records to be made or kept.

On or before September 30, 1974, and annually thereafter, every political jurisdiction with 15 or more employees is required to make or keep records and the information therefrom which are or would be necessary for the completion of report EEO-4 under the circumstances set forth in the instructions thereto, whether or not the political jurisdiction is required to file such report under § 1602.32 of the regulations in this part. The instructions are specifically incorporated herein by reference and have the same force and effect as other sections of this part. Such records and the information therefrom shall be retained at all times for a period of 3 years at the central office of the political jurisdiction and shall be made available if requested by an officer, agent, or employee of the Commission under section 710 of title VII, as amended. Although agency data are aggregated by functions for purposes of reporting, separate data for each agency must be maintained either by the agency itself or by the office of the political jurisdiction responsible for preparing the EEO-4 form. It is the responsibility of every political jurisdiction to obtain from the Commission or its delegate necessary instructions in order to comply with the requirements of this section.

* * *

### § 1602.32 Requirement for filing and preserving copy of report.

(a) On or before September 30, 1974 and annually thereafter, certain political jurisdictions subject to title VII of the Civil Rights Act of 1964, as amended, shall file with the Commission or its delegate executed copies of "State and Local Government Information Report EEO-4" in conformity with the directions set forth in the form and accompanying instructions. The political jurisdictions covered by this regulation are (1) those which have 100 or more employees, and (2) those other political jurisdictions which have 15 or more employees from whom the Commission requests the filing of reports. Every such political jurisdiction shall retain at all times a copy of the most recently filed

EEO-4 at the central office of the political jurisdiction for a period of 3 years and shall make the same available if requested by an officer, agent, or employee of the Commission under the authority of section 710 of title VII, as amended.

(b) For calendar year 1973, the requirements of paragraph (a) of this section shall be carried out on or before October 31, 1973.

* * *

APPENDIX I

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

STATE AND LOCAL GOVERNMENT INFORMATION REPORT EEO-4

* * *

2. *Race/Ethnic identification.* An employer may acquire the race/ethnic information necessary for this section either by visual surveys of the work force, or from postemployment records as to the identity of employees. An employee may be included in the minority group to which he or she appears to belong, or is regarded in the community as belonging.

Since visual surveys are permitted, the fact that race/ethnic identifications are not present or agency records is not an excuse for failure to provide the data called for.

Moreover, the fact that employees may be located at different addresses does not provide an acceptable reason for failure to comply with the reporting requirements. In such cases, it is recommended that visual surveys be conducted for the employer by persons such as supervisors who are responsible for the work of the employees or to whom the employees report for instructions or otherwise.

Please note that conducting a visual survey and keeping post-employment records of the race or ethnic origin of employees is legal in all jurisdictions and under all Federal and State laws. State laws prohibiting inquiries and recordkeeping as to race, etc., relate only to applicants for jobs, not to employees.

The concept of race as used by the Equal Employment Opportunity Commission does not denote clearcut scientific definitions of anthropological origins. For the purposes of this report, an employee may be included in the group to which he or she appears to belong, identifies with, or is regarded in the community as belonging. However, no person should be counted in more than one race/ethnic category. NOTE: The category "Spanish Surnamed," while not a race identification, is included as a separate ethnic category because of the employment discrimination often encountered by this group; for this reason do not include Spanish Surnamed under either "white" or "black".

The category "White" should include persons of Indo-European descent, including Pakistani and East Indian.

The category "Black" should include persons of African descent as well as those identified as Jamaician; Trinidadian, and West Indian.

The category "Spanish Surnamed" should include all persons of Mexican, Puerto Rican, Cuban, Latin American or Spanish descent. The category "American Indian" should include persons who identify themselves or are known as such by virtue of tribal association.

The category "Asian American" should include persons of Japanese, Chinese, Korean, or Filipino descent.

The category "Other" should include Aleuts, Eskimos, Malayans, Thais, and others not covered by the specific categories on the form. [38 F.R. 5661.]

* * *

Preamble. In memoranda from the Office of Management and Budget and the General Accounting Office dated April 15, 1975 and September 9, 1975 respectively the Commission was advised that its survey forms must use the standard race/ethnic categories. This change does not require new recordkeeping. The changes to the standard race/ethnic categories on the EEO-1, EEO-2, EEO-2E, and EEO-3 is primarily one of nomenclature and does not involve radical departures from the current definitions. The changes are as follows:

1. The category "White not of Hispanic origin" is added as a specific category, and includes by definition persons of the Indian Subcontinent. Otherwise this category corresponds to the residual group, that is, all those persons who were not classified into one of the four specific minority categories on the survey forms.

2. "Negro" is changed to read "Black not of Hispanic origin". The definition remains the same except that the title itself now excludes those persons of hispanic origin who might otherwise have been reported as Black by virtue of race.

3. "Spanish Surnamed American" is changed to "Hispanic" and includes in addition to persons of Mexican, Puerto Rican, and Cuban or Spanish origin, as defined in the former category, persons of Central or South America and other Spanish culture regardless of race.

4. "Oriental" is replaced by the category "Asian or Pacific Islander", and expressly includes persons of South East Asian and Pacific Island origins, who previously might or might not have been reported in the "Oriental" category.

5. "American Indian" is replaced by "American Indian or Alaskan Native". The definition for this category is restricted to persons having origins in any of the original peoples of North America.

As these changes are minor, employers should have no difficulty implementing them, and will have ample time to change their internal records to reflect the new categories.

Notice. The Equal Employment Opportunity Commission hereby gives notice that the Equal Employment Opportunity Employer Information Report EEO-1 as required by 29 CFR 1602.07 for 1977 and for subsequent years will reflect five (5) new race/ethnic categories. The same race/ethnic categories will also be reflected on the Apprenticeship Information Reports EO-2 [*sic*] and EEO-2E, 29 CFR 1602.15, and the Local Union Report EEO-3, 29 CFR 1602.22 for 1976 and subsequent years. The five race/ethnic categories are defined as follows:

1. *White (not of Hispanic origin):* All persons having origins in any of the original peoples of Europe, North Africa, the Middle East, or the Indian subcontinent.

2. *Black (not of Hispanic origin):* All persons having origins in any of the black racial groups.

3. *Hispanic:* All persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

4. *Asian or Pacific Islanders:* All persons having origins in any of the original peoples of the Far East, Southeast Asia, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

5. *American Indian or Alaskan Native:* All persons having origins in any of the original peoples of North America. [41 F.R. 17601-02.]*

*Although the provisions of 41 F.R. 17601-02 do not expressly refer to the State and Local Government Reports EEO-4, counsel for New Hampshire has been informed by an official of the EEOC that these provisions will nevertheless be applied to the EEO-4 Reports.